

An Application for Reconsideration

- by -

Derek Blyth

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Fern Jeffries

FILE No.: 2002/182

DATE OF DECISION: June 5, 2002

DECISION

OVERVIEW

This is an application for reconsideration pursuant to Section 116 of the *Employment Standards Act* that provides:

- (1) On application under subsection (2) or on its own motion, the tribunal may
 - (a) reconsider any order or decision of the tribunal, and
 - (b) cancel or vary the order or decision or refer the matter back to the original panel.

Derek Blyth (“Blyth”) complained to the Employment Standards Branch that he had not been fully compensated for vacation pay on retiring from Woodpro Engineering Ltd. Blyth commenced employment on February 1, 1985 and retired February 28, 2001. Blyth claimed that he was always a year in arrears in taking vacation.

The Determination found that there was insufficient evidence to prove that the Act had been contravened. Blyth appealed the Determination and the Tribunal determined that an oral hearing was required. The first date set for that oral hearing was cancelled by the Tribunal. The appellant did not appear via teleconference for the rescheduled hearing and in accordance with Tribunal policy, the adjudicator ruled that the appeal had been abandoned. The appellant now seeks reconsideration of that decision.

ISSUE:

There are two issues on reconsideration: Does this request meet the threshold established by the Tribunal for reconsidering a decision. If so, should the decision be cancelled or varied or sent back to the Adjudicator?

ANALYSIS:

1. The Threshold Test

The Tribunal reconsiders a Decision only in exceptional circumstances. The Tribunal uses its discretion to reconsider decisions with caution in order to ensure finality of its decisions and to promote efficiency and fairness of the appeal system to both employers and employees. This supports the purposes of the *Act* detailed in Section 2 “to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act.”.

In *Milan Holdings (BCEST # D313/98)* the Tribunal set out a principled approach in determining when to exercise its discretion to reconsider. The primary factor weighing in favour of reconsideration is whether the applicant has raised questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases.

The Tribunal may agree to reconsider a Decision for a number of reasons, including:

- The adjudicator fails to comply with the principles of natural justice;
- There is some mistake in stating the facts;
- The Decision is not consistent with other Decisions based on similar facts;
- Some significant and serious new evidence has become available that would have led the Adjudicator to a different decision;
- Some serious mistake was made in applying the law;
- Some significant issue in the appeal was misunderstood or overlooked; and
- The Decision contains some serious clerical error.

BC EST#D122/96

While this list is not exhaustive, it reflects the practice of the Tribunal to use its power to reconsider only in very exceptional circumstances. The Reconsideration process was not meant to allow parties another opportunity to re-argue their case.

This is an unusual situation. Normally when the Tribunal schedules a hearing, the date is kept by all parties. In this case the Tribunal was forced to cancel the original date, February 8, 2002. There appears to be some confusion around whether the re-scheduled date was convenient. It is the practice at the Tribunal to change dates at the request of a party only if a very good reason is provided. This is because it is not uncommon for there to be many such requests and the Tribunal is most cognizant of our responsibility to manage cases as expeditiously as possible. In this case, the Tribunal changed the original date and was not amenable to subsequent requests to change the rescheduled hearing.

Although none of the normal factors for granting a reconsideration as cited above apply in this case, it is my opinion that this case is sufficiently unusual so as to warrant a reconsideration. In order to ensure a full and fair hearing of this appeal, the Tribunal must bear responsibility for canceling the original date. Although the Decision of the adjudicator followed Tribunal policy and practice, the original responsibility for rescheduling must be born by the Tribunal.

ORDER:

I refer back the decision to the original adjudicator to rehear this matter.

Fern Jeffries
Chair
Employment Standards Tribunal